

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

GREGORY P. BARNES, DAVID C.
BOLLE, MARY D. WASSON, and JERRY
M. CHAPMAN, on their own behalf and on
behalf of others similarly situated,

Plaintiffs,

V.

THE HERSHEY COMPANY,

Defendant.

Case No. 12-cv-01334 CRB (NC)

ORDER RESOLVING DISCOVERY DISPUTES

Re: Dkt. Nos. 165, 166

Pending before the Court are two joint discovery letter briefs, Dkt. Nos. 165 and 166, in which plaintiffs request that the Court order Hershey to produce documents, provide responses to interrogatories, and produce individuals and designees under Federal Rule of Civil Procedure 30(b)(6) for deposition. Discovery in this case is no longer limited to the issue of waiver after District Court Judge Charles R. Breyer lifted the bifurcation of discovery and ordered the parties “to proceed with discovery on all issues.” Dkt. No. 148.

In general, “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.” Fed. R. Civ. P. 26(b)(1). Furthermore, “[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.” *Id.* Information is relevant for discovery purposes if it “appears

1 reasonably calculated to lead to the discovery of admissible evidence.” *Id.* However, even
 2 when the information sought by the parties in a civil lawsuit is relevant, the Court must
 3 limit the scope of discovery if it determines that (1) “the discovery sought is unreasonably
 4 cumulative or duplicative, or can be obtained from some other source that is more
 5 convenient, less burdensome, or less expensive”; (2) “the party seeking discovery has had
 6 ample opportunity to obtain the information by discovery in the action”; or (3) “the burden
 7 or expense of the proposed discovery outweighs its likely benefit, considering the needs of
 8 the case, the amount in controversy, the parties’ resources, the importance of the issues at
 9 stake in the action, and the importance of the discovery in resolving the issues.” Fed. R.
 10 Civ. P. 26(b)(2)(C). In other words, the Court seeks to “strike[] the proper balance between
 11 permitting relevant discovery and limiting the scope and burdens of the discovery to what is
 12 proportional to the case.” *Kaiser v. BMW of N. Am., LLC*, No. 12-cv-01311 DMR, 2013
 13 WL 1856578, at *3 (N.D. Cal. May 2, 2013).

14 Having considered the parties’ joint letter briefs and proposed orders, the arguments
 15 of counsel, and the record in this case, the Court ORDERS as follows:

16 **1. Depositions**

17 **a. Deposition of Otis Smith**

18 Plaintiffs seek to depose Otis Smith because he was directly involved in the
 19 termination of Mary Frazier and has submitted a declaration in support of Hershey’s
 20 pending motion for summary judgment. Hershey contends that the deposition is not
 21 appropriate because Otis Smith is on medical leave and plaintiffs have not shown that the
 22 declaration is inaccurate. The Court orders Hershey to produce Otis Smith for a deposition
 23 within 30 days of this order. The deposition must not exceed two hours, absent further
 24 Court order, and may take place by telephone or video, at the parties’ agreement.

25 **b. Depositions of Dave Onorato, Dan Vucovich, and Dave West**

26 Hershey is ordered to produce for deposition Dave Onorato. However, plaintiffs’
 27 request to compel the depositions of Dan Vucovich and Dave West, who are Hershey’s
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1 former Senior Vice President and Global Chief Customer Officer and Chief Executive
2 Officer, respectively, is denied without prejudice at this time. The single email relied on by
3 plaintiffs as a reason for seeking to depose these high-ranking corporate officers is
4 insufficient. After plaintiffs have completed the deposition of Dave Onorato, they may
5 renew their request to depose Dan Vucovich and Dave West, but plaintiffs will have to
6 establish a reasonable basis to expect that Dan Vucovich and Dave West have personal
7 involvement or any relevant knowledge that cannot be discovered through any less
8 burdensome procedure.

9 **c. Deposition of Jacqui Fanelli**

10 Hershey objects to the deposition of Jacqui Fanelli as cumulative and duplicative of
11 other discovery Hershey has provided or agreed to provide, including the deposition of
12 Holly Magnuson. Plaintiffs have not explained why the deposition is not unreasonably
13 cumulative or duplicative, or why the benefit of this deposition exceeds its burden.
14 Accordingly, plaintiffs' request to compel this deposition is denied.

15 **d. Deposition of Thomas Smuda**

16 Hershey objects to the deposition of Thomas Smuda, asserting that he (1) did not
17 manage (directly or indirectly) any Customer Sales Executive ("CSE") or Category
18 Development Manager ("CDM"); (2) Thomas Smuda's declarations in support of Hershey's
19 motion to transfer the case were relevant only to the issue of transfer and not to the facts of
20 this case; and (3) the mention of Thomas Smuda in a handwritten note that plaintiffs
21 reference has no relevance to this case. Plaintiffs have not explained why the benefit of this
22 deposition exceeds its burden. Accordingly, plaintiffs' request to compel this deposition is
23 denied.

24 **e. Topics 1 & 4**

25 These topics concern any realignments, restructurings, reorganizations, or reductions
26 in force that affected the CSE or CDM position between 2009 and 2013 that applied within
27 the regions where plaintiffs were employed. Hershey has already agreed to provide a
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1 corporate representative to testify as to any realignments, restructurings, reorganizations, or
2 reductions in force that impacted any of the plaintiffs. Hershey contends that the burden to
3 prepare and provide corporate representatives to testify regarding realignments,
4 restructurings, reorganizations, or reductions in force that did not affect a plaintiff in this
5 case substantially outweighs the likely benefits, if any, to plaintiffs of any such depositions.
6 Hershey, however, has failed to substantiate this burden. While plaintiffs do not address
7 Hershey's specific argument, they assert generally that "each of these topics" seeks
8 information relevant to whether Hershey engaged in group termination or whether it
9 engaged in pattern or practice of age discrimination. Given that discovery is no longer
10 limited, and that the challenged part of these topics is at least marginally relevant to a claim
11 or defense in this case, the Court orders Hershey to produce a corporate designee on the
12 entirety of these two topics.

13 **f. Topics 2 & 3**

14 These topics ask Hershey to provide a corporate representative to testify about any
15 "exit incentive" plans or "termination programs" as defined in 29 U.S.C. § 626(f) and 29
16 C.F.R. § 1625.22(f), applied to CSEs and/or CDMs 2009 to 2013 within the regions where
17 plaintiffs were employed. Hershey contends that these topics are inappropriate because
18 they seek legal conclusions as to whether any Hershey activities could be defined as "exit
19 incentive" plans or "termination programs." Further, Hershey has indicated that any
20 corporate representative it identified to testify on this topic would answer these questions in
21 the negative and that it would be far less burdensome to do so via an interrogatory.

22 The Court agrees that these two topics seek legal conclusions that could be more
23 appropriately addressed through contention interrogatories or requests for admission. This
24 order does not preclude plaintiffs from seeking testimony as to *the facts* relevant to "exit
25 incentive" plans or "termination programs." Accordingly, plaintiffs' requests to compel
26 Rule 30(b)(6) designees on these deposition topics are denied.

g. Topic 5

2 This topic asks Hershey to provide a corporate representative to testify as to the
3 employment separations of (1) each of the plaintiffs in this case; and (2) each of the 23
4 CSEs and CDMs who had the opportunity to join this case, but chose not to do so. Hershey
5 asserts that it has agreed to provide corporate representatives to testify regarding the
6 employment separations of each of the plaintiffs, and has already provided several such
7 representatives. Hershey objects to providing corporate representatives to testify as to the
8 employment separations of the 23 CSEs and CDMs who chose not to join this case on the
9 grounds that these depositions would be cumulative and duplicative of other discovery that
10 Hershey has already agreed to provide via interrogatory responses and the production of
11 documents, and because the burden of preparing 15-20 additional corporate representatives
12 to testify on this topic substantially outweighs any likely benefit to plaintiffs from these
13 depositions.

14 The Court finds that the testimony sought by plaintiffs on this topic appears
15 reasonably calculated to lead to the discovery of admissible evidence as to whether Hershey
16 engaged in group termination or whether it engaged in pattern or practice of age
17 discrimination. However, Hershey has agreed to provide a complete response to plaintiffs'
18 Interrogatory No. 9 concerning this topic. Additionally, at least some of the information
19 sought could be discovered from Hershey's responses to document requests and production
20 of ESI, which is a subject of an ongoing meet and confer process and a pending discovery
21 letter brief. Accordingly, at this time the Court denies plaintiffs' request to compel Rule
22 30(b)(6) designees on this deposition topic without prejudice.

h. Topic 6

24 This topic seeks a corporate representative to testify regarding Hershey's "prior
25 noncompliance with the Older Workers Benefit Protection Act." Hershey objects to this
26 topic as being (1) vague and ambiguous; (2) not an appropriate topic for a Rule 30(b)(6)
27 deposition; and (3) irrelevant to the issues of this case on its face. The Court finds that

1 while the potential relevance might be low, this topic appears reasonably calculated to lead
2 to the discovery of admissible evidence as to whether Hershey engaged in group
3 termination or whether it engaged in pattern or practice of age discrimination. However,
4 the information sought by this topic could be more appropriately addressed by
5 interrogatories or document requests, instead of deposition testimony. Accordingly,
6 plaintiffs' request to compel Rule 30(b)(6) designees on this deposition topic is denied.

7 **i. Topic 7**

8 This topic seeks a corporate representative to testify regarding any plans or goals to
9 sever CSEs and CDMs in 2009 through 2011. Hershey objects to this topic on the ground
10 that it has already indicated to plaintiffs that it had no plans or goals to sever CSEs or
11 CDMs from 2009 through 2011 and has agreed to produce any responsive documents
12 relevant to this topic. Given that Hershey is ordered to produce a corporate designee on
13 realignments, restructurings, reorganizations, or reductions in force that affected the CSE or
14 CDM position, and Hershey's representation that it had no plans or goals to sever CSEs or
15 CDMs from 2009 through 2011, the added burden of producing a corporate designee on this
16 topic appears minimal. Therefore, the Court orders Hershey to produce a corporate
17 designee on this topic.

18 **j. Topic 8**

19 This topic seeks a corporate representative to testify regarding “[t]rends of
20 terminations of CSEs and CDMs age 40 or older from 2006 to the present.” Hershey
21 objects to this topic on the grounds that (1) it is vague and ambiguous; (2) it is not a proper
22 subject for a Rule 30(b)(6) deposition; and (3) Hershey has agreed to provide data from
23 which plaintiffs can draw their own conclusions regarding any trends in CSE and CDM
24 terminations, rendering this deposition cumulative of other discovery Hershey has already
25 agreed to provide. The Court finds that this topic, as currently phrased, is vague and
26 appears unreasonably cumulative of other discovery propounded, and on this basis denies
27 plaintiffs' request to compel a Rule 30(b)(6) designee on this deposition topic.

1 **k. Topic 9**

2 This topic seeks a corporate representative to testify regarding any employee who
3 took over any of the duties of any of the plaintiffs after their separations from employment.
4 Hershey objects to this topic as vague and ambiguous because (1) it would include not only
5 any individuals who actually replaced plaintiffs in their positions, but also any individual
6 who took over even a single duty that a plaintiff once performed; and (2) it purports to
7 require a corporate representative to testify as to every aspect of these individuals and their
8 employment with Hershey. Hershey further asserts that it has already provided plaintiffs
9 with interrogatory responses regarding their replacements, along with copies of their
10 personnel files, rendering the discovery sought by this topic cumulative of other discovery.
11 The Court finds that this topic, as currently phrased, is vague, overbroad, and appears
12 unreasonably cumulative of other discovery propounded, and on this basis denies plaintiffs'
13 request to compel a Rule 30(b)(6) designee on this deposition topic.

14 With respect to the depositions ordered by the Court, the parties must cooperate on
15 the timely and reasonable scheduling.

16 **2. Interrogatories**

17 **a. Interrogatory No. 9**

18 This interrogatory concerns the separation from employment with Hershey of the 23
19 CSEs and CDMs who received notice of this action but chose not to join it. Hershey has
20 agreed to provide a full and complete response to this interrogatory and is hereby ordered to
21 do so within 30 days of the date of this order.

22 **b. Interrogatories Nos. 11 and 12**

23 These interrogatories seek information regarding any realignments, restructurings, or
24 reorganizations that affected the CSE or CDM positions between January 1, 2009, and
25 December 11, 2012. Hershey objects to these interrogatories to the extent they require it to
26 identify all realignments, restructurings, or reorganizations that either did not result in the
27 separation from employment of a CSE or CDM over the age of 40, or did not result in any

1 separation from employment at all.

2 In light of the order lifting the bifurcation on discovery, the Court finds that while the
 3 potential relevance might be low, these interrogatories appear reasonably calculated to lead
 4 to the discovery of admissible evidence as to whether Hershey engaged in group
 5 termination or whether it engaged in pattern or practice of age discrimination. Hershey has
 6 not substantiated its assertion of undue burden. Accordingly, Hershey is ordered to provide
 7 complete responses to these interrogatories within 30 days of the date of this order.

8 **c. Interrogatories Nos. 22 and 23**

9 These interrogatories seek information regarding the numbers and ages of CSEs and
 10 CDMs employed by Hershey and separated from employment with Hershey from January
 11 1, 2009, through December 31, 2011. Hershey has agreed to produce the information
 12 sought by these interrogatories and is hereby ordered to do so within 30 days of the date of
 13 this order.

14 **3. Document Requests**

15 **a. Request for Production No. 3**

16 This request for production seeks organizational charts for Hershey's sales
 17 organization from 2007 to the present. Hershey has agreed to produce representative
 18 organizational charts for all CSEs and CDMs and their chain of command within the sales
 19 organization from January 1, 2009, through December 31, 2012, but objects to producing
 20 organizational charts covering the larger time period as being beyond the proper focus of
 21 discovery and as unduly burdensome.

22 The Court finds that this document request appears reasonably calculated to lead to
 23 the discovery of admissible evidence and that Hershey has not substantiated its burden
 24 objection. Accordingly, Hershey is ordered to produce representative organizational charts
 25 responsive to this request for production within 30 days of the date of this order.

26 **b. Request for Production No. 15**

27 Request No. 15 asks for the personnel file for any CSE or CDM who was age 40 or

1 older and was involuntarily terminated from employment with Hershey from January 1,
2 2012, to the present. Hershey objects to producing responsive documents after March 25,
3 2013, based on the lack of relevance and that the purpose of the request is a “fishing
4 expedition.”

5 The Court finds that the documents sought by this request appear reasonably
6 calculated to lead to the discovery of admissible evidence as to whether Hershey engaged in
7 group termination or whether it engaged in pattern or practice of age discrimination.
8 Accordingly, Hershey is ordered to produce all documents responsive to this request for
9 production within 30 days of the date of this order.

10 **c. Request for Production No. 16**

11 Request No. 16 asks for all documents regarding the employment separations for any
12 CSE or CDM who was age 40 or older and involuntarily terminated from employment with
13 Hershey from January 1, 2012, to the present. In addition to making the same objection as
14 to the temporal scope of this request as the objection made to Requests Nos. 15 and 17,
15 Hershey contends that this request is unduly burdensome as it would include “interviewing
16 and collecting email and electronic and hard-copy documents from dozens of additional
17 custodians.” Hershey contends that this is especially true given Hershey’s willingness to
18 (1) provide complete interrogatory responses regarding the separations from employment of
19 each of these 23 individuals; and (2) produce all responsive documents related to the
20 separations from employment of each of these 23 individuals captured within the
21 approximately 85,000 search term “hits.”

22 As an initial matter, the Court finds that the documents sought by this request appear
23 reasonably calculated to lead to the discovery of admissible evidence as to whether Hershey
24 engaged in group termination or whether it engaged in pattern or practice of age
25 discrimination. However, the Court has not been presented with sufficient information to
26 assess the proportionality and burden of the requested discovery. Because this document
27 request is related to the ESI issues which are a subject of an ongoing meet and confer
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1 process and another pending discovery letter brief, the Court will take this request under
2 submission and resolve it at the same time as the ESI issues.

3 **d. Request for Production No. 17**

4 Request No. 17 asks for the personnel file for any employee who took over the
5 position of any CSE or CDM who was age 40 or older and involuntarily terminated from
6 employment with Hershey from January 1, 2012, to the present. Hershey objects to
7 producing responsive documents after March 25, 2013, based on the lack of relevance and
8 that the purpose of the request is a “fishing expedition.”

9 The Court finds that the documents sought by this request appear reasonably
10 calculated to lead to the discovery of admissible evidence as to whether Hershey engaged in
11 group termination or whether it engaged in pattern or practice of age discrimination.
12 Accordingly, Hershey is ordered to produce all documents responsive to this request for
13 production within 30 days of the date of this order.

14 **e. Requests for Production Nos. 20 and 21**

15 Request for Production No. 20, as modified, asks for personnel files for any CDM or
16 CSE who was age 40 or older and was involuntarily severed from employment from
17 January 1, 2009, to the present, including all documents that “relate in any way to the
18 involuntary severance. Request for Production No. 21 asks for personnel files for any
19 employee who took over the position or responsibilities of such CDM or CSE. Hershey
20 objects to these requests on the grounds that they are duplicative and cumulative to other
21 discovery requests and seek personnel files that Hershey has already produced. Plaintiffs
22 have not explained why these requests are not unreasonably duplicative and cumulative.
23 Accordingly, plaintiffs’ request to compel responses to these requests for production are
24 denied.

25 **f. Request for Production No. 23**

26 This request for production seeks documents related to plans to reduce head counts of
27 CSEs or CDMs from January 1, 2009, to the present. Hershey asserts that it has already
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1 responded to this request by indicating that its investigation has not uncovered any such
2 documents to the extent the plans at issue affected plaintiffs. Hershey further asserts that, in
3 the pending discovery dispute, Hershey has also indicated that its investigation has not
4 identified any documents related to plans to reduce the head count of CSEs or CDMs,
5 regardless of whether the plan affected plaintiffs.

6 Hershey is ordered to amend its response to this discovery request to reflect its
7 position that it has no relevant documents. Additionally, the Court orders that Hershey
8 promptly produce any documents responsive to this request if such documents are
9 discovered as the result of further investigation.

10 Any party may object to this non-dispositive discovery order within 14 days under
11 Federal Rule of Civil Procedure 72(a).

12 IT IS SO ORDERED.

13 Date: September 5, 2014



14 Nathanael M. Cousins
United States Magistrate Judge

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